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THE INTERNET AND THE FATE OF PUBLIC EXPRESSION: CONTROLLING SOUND BYTES.

Elena Sousa December 10, 2012

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I. INTRODUCTION

In 1988, the British Indian novelist and essayist Salman Rushdie published the novel, *The Satanic Verses*, which Muslims around the world believed to be a blasphemous portrayal of Prophet Muhammad “as an evil man, a liar, and one, who is sexual in nature...”¹ This sparked a violent reaction from Muslim community, resulting in bookstores being bombed in England and the U.S.² An Iranian leader Ayatollah Ruhollah Khomeini issued a fatwa³ which called for the death of Rushdie, and an award of three million dollars was offered for his assassination.⁴ Several translators of the book were attacked and one was stabbed to death by Islam extremists.⁵

In 2004, the Dutch film maker Theo Van Gogh directed a short movie called “Submission.” The movie consists of the monologues of four abused Muslim women who wear see-through dresses while verses from The Koran, specifically ones that are interpreted as authorizing abuse against women, are written on their bodies. The film director was shortly thereafter murdered in public and a letter was stabbed to his body that called for jihad against infidels in America, Europe, Netherlands, and against the writer of the movie.⁶

In 2005, the Danish newspaper *Jyllands-Posten* published twelve cartoons depicting the prophet Muhammad in a satirical way. The cartoons were an illustration for an editorial criticizing self-censorship in the Danish media. Muslim groups in Denmark filed a complaint with the Danish police, but the complaint was dismissed, and the Danish government refused to

¹ Shahid Juma, *The Satanic Verses*, <http://islamicentre.org/articles/rush.htm>.

² *London Bookshops Bombings Are Tied to ‘Satanic Verses’*, N.Y. Times Apr. 11, 1989, <http://www.nytimes.com/1989/04/11/world/london-bookshop-bombings-are-tied-to-satanic-verses.html>.

³ Fatwa: a legal opinion or decree handed down by an Islamic religious leader, <http://www.merriam-webster.com/>.

⁴ Nasser Karimi, *Salman Rushdie Death Fatwa: Iran Adds To Reward For Author’s Killing*, Huff. Post, Sep. 16, 2012, http://www.huffingtonpost.com/2012/09/16/salman-rushdie-death-fatw_n_1888111.html.

⁵ Steven R. Weisman, *Japanese Translator of Rushdie Book Found Slain*, N.Y. Times, July 13, 1991, <http://www.nytimes.com/books/99/04/18/specials/rushdie-translator.html>; Timothy Garton Ash, *No ifs and no buts*, Guardian, June 22, 2007, <http://www.guardian.co.uk/commentisfree/2007/jun/23/comment.religion>.

⁶ Rebecca Leung, *Slaughter And ‘Submission’*, CBS News, originally aired Mar. 13, 2005, http://www.cbsnews.com/8301-18560_162-679609.html.

intervene in the controversy. Dissatisfied with the reaction of Danish government, Danish Islamic leaders publicized the cartoons in the Middle East, triggering massive outrage throughout the Muslim world, leading to riots, the burning of embassies and churches, and the death of some 200 people.⁷

In September 2012, the world was shaken again with violent protests caused by a 14-minute video initially uploaded on YouTube in July 2012. The video was created by Nakoula Basseley Nakoula, an Egyptian-born U.S. resident, and was promoted by Morris Sadek, an Egyptian-American Coptic Christian activist known for being a fierce critic of Islam. Sadek translated the video into Arabic, posted it on his website, and emailed it to Egyptian journalists.⁸ On September 9, 2012, the movie was broadcast on an Egyptian television channel. The video depicts Muhammad as a fraud, a drunk, and a thief, and shows him having sex and calling for massacres. It is evident from the video itself and the surrounding circumstances⁹ that it was intended to serve as provocation. The video was labeled “a bigoted piece of poison calculated to inflame the Muslim world.”¹⁰ Violent protests throughout the Islamic nations, as well as Europe, followed immediately, with attacks on American embassies and diplomatic properties of

⁷ Martin Asser, *What the Muhammad cartoons portray*, BBC News, Jan. 2, 2010, http://news.bbc.co.uk/2/hi/middle_east/4693292.stm, John Ward Anderson, *Cartoons of Prophet Met With Outrage*, Wash. Post, Jan. 31, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001316.html>, *Danish Cartoon Controversy*, N.Y. Times, Updated: Aug. 12, 2009, http://topics.nytimes.com/topics/reference/timestopics/subjects/d/danish_cartoon_controversy/index.html.

⁸ *Mysterious Anti-Muslim Movie Prompts Protests in Egypt*, N.Y. TIMES BY THE ASSOCIATED PRESS (Sep. 11, 2012), <http://www.nytimes.com/2012/09/12/world/middleeast/movie-stirs-protest-at-us-embassy-in-cairo.html>, Danie Burke, *Morris Sadek, The ‘Maverick’ Egyptian-American Copt Behind Anti-Islamic Film ‘Innocence of Islam’*, Huff. Post, Sep. 14, 2012, http://www.huffingtonpost.com/2012/09/14/morris-sadek-the-maverick_n_1882931.html.

⁹ Nakoula first identified himself as Sam Bacile, claimed he was Jewish and Israeli. See Ben Piven, *Who is Nakoula Basseley Nakoula*, Al Jazeera, Sep. 15, 2012, <http://www.aljazeera.com/indepth/features/2012/09/2012915181925528211.html>.

¹⁰ *Innocence of Muslims: a dark demonstration of the power of the film*, Guardian Film Blog, <http://www.guardian.co.uk/film/filmblog/2012/sep/17/innocence-of-muslims-demonstration-film> (last visited Dec. 4, 2012).

European nations.¹¹ Google and YouTube voluntarily blocked the video in some Muslim countries, and issued a statement saying: “This video - which is widely available on the Web - is clearly within our guidelines and so will stay on YouTube. However, given the very difficult situation in Libya and Egypt, we have temporarily restricted access in both countries.”¹²

The process of globalization and the development of the Internet brought the world into a new dimension which the legal systems, developed in traditional ways within national borders, are not prepared to address. Today someone sitting in his home in Texas can accidentally violate the law of France without ever putting his foot on French soil. We are, in a very real sense, a world without border.

The purpose of this paper is to analyze to what extent the old models developed by the American jurisprudence are adequate to address the volatile situation outlined above. The paper analyzes what legal recourse is afforded to the government and whether those legal options run afoul of traditional notions of free speech. The paper also examines whether the old models can be effective in the digital age.

Part II lays out the complexities arising out of the globalized world, the clash of different cultures exacerbated by the Internet connecting the world together.

Part III analyzes the First Amendment exceptions existing in the U.S. jurisprudence that may be used by the government to prevent future violent reactions of Islamic nations to speech originated in the U.S. It also shows why these approaches are not viable in today’s realities.

¹¹ Rick Gladstone, *Anti-American Protests Flare Beyond the Mideast*, N.Y. Times, Sep. 14, 2012, http://www.nytimes.com/2012/09/15/world/middleeast/anti-american-protests-over-film-enter-4th-day.html?_r=1&hp&pagewanted=all.

¹² Claire Cain Miller, *As Violence Spreads in Arab World, Google Blocks Access to Inflammatory Video*, N.Y. Times, Sep. 13, 2012, <http://www.nytimes.com/2012/09/14/technology/google-blocks-inflammatory-video-in-egypt-and-libya.html>.

Part IV explores the speech suppression in the name of the global war against terrorism in the United States and internationally.

Part V analyzes another third possible approach and to address the situation, as well as its flaws, - geographical filtering.

II. COMPLEXITIES OF A GLOBALIZED WORLD.

A. The clash of civilizations

What we see occurring today is a modern “clash of civilizations,” a phenomenon famously described by a U.S. political scientist, Samuel P. Huntington. In his article, “The Clash of Civilizations?,” published in *Foreign Affairs* in 1993, he argued that in the post-Cold-War world, which ended the age of American versus Soviet ideologies, there would arise cultural and religious difference that would become the main source of world conflicts.¹³ Huntington identified a number of reasons for such a clash which include traditionally different views on the basics of religion, morality, life structure of people of different civilizations, and the fact that interactions are increasing as the world is becoming a smaller place, where such an increase brings about consciousness and awareness of the differences. Social and economic modernization separates people from their identities causing them to search the solution in religion, often turns in the form of “fundamentalism.”¹⁴ He points also to the fact that the West is too vigorous in its attempts to spread its values of democracy, liberalism, and universal values, in order to maintain its military predominance and to advance its own economic and commercial

¹³ Samuel P. Huntington, *The Clash of Civilizations?*, 72 No. 3 *Foreign Affairs* 22 (1993).

¹⁴ *Id.* at 24-27.

interests. Huntington believes that other civilizations will attempt to defend themselves by appealing to common religion and cultural identity.¹⁵

It appears that recent events prove Huntington's point. The clash between Western liberties, the idea of freedom of speech, religion, and the press, and the lack of governmental control over people's choices on the one hand, and Sharia, the religious law of Islam, on the other, has intensified tremendously with the globalization of the end of the 20th century. Speech protections in the Muslim world is quite different from what we see in the West. Slander, gossip, and backbiting, or "ghiba" is regarded as a major sin in the Sharia law.¹⁶ Discussion of religion, namely Islam, in a disrespectful way is illegal. Insulting the Prophet Muhammad is prohibited. Any criticism is viewed as blasphemy and is punishable by death.¹⁷ Therefore, while in the Western world we value free speech, in the Muslim world one is sure to be killed if he insults Islam in general and Muhammad in particular.

The clash was highlighted on the UN General Assembly in New York in September 2012, shortly after the world wide protests against the Innocence of Muslims video. The U.S. President Barack Obama in his speech to the General Assembly condemned the violence the movie caused and at the same time vigorously defended the constitutional protections.¹⁸ Islamic leaders also condemned a violent reaction and also defended freedom of speech, freedom as it is understood in the world of Islam: "Egypt respects freedom of expression. One that is not used to incite

¹⁵ *Id.* at 29.

¹⁶ Muhammad Al-Madni Busaq, *Perspectives on Modern Criminal Policy & Islamic Sharia*, Naif Arab University, 2005, at 108, 114.

¹⁷ What To Do When People Insult The Prophet, FAQ, available at http://muslimconverts.com/insulting/punishment_for_those_who_insult_prophet.htm (last visited Dec. 4, 2012).

¹⁸ *Obama's Speech to the United Nations General Assembly – Text*, N.Y. Times, Sep. 25, 2012 ("Americans have fought and died around the globe to protect the right of all people to express their views, even views that we profoundly disagree with. We do not do so because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their own views and practice their own faith may be threatened. We do so because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities.") http://www.nytimes.com/2012/09/26/world/obamas-speech-to-the-united-nations-general-assembly-text.html?_r=0.

hatred against anyone. One that is not directed towards one specific religion or culture,” said a newly elected Egyptian President Mohamed Morsi a day later.¹⁹ Other Islamic leaders called for global anti-blasphemy laws,²⁰ the idea denounced by the U.S. back in 1952.²¹

B. The Internet and the First Amendment.

Huntington argued that increasing globalization creates an increase in the clash of civilizations. Little did he know back in 1993 about the scenarios that would be exacerbated by the public Internet and the World Wide Web. The events that have recently transpired in the world have given a much more complex and perhaps even ironic meaning to what the then-Vice President Al Gore meant in 1994 when he said: "Let us build a global community in which the people of neighboring countries view each other not as potential enemies, but as potential partners, as members of the same family in the vast, increasingly interconnected human family."²² This network, this global village of interconnectedness, of content uploaded by ordinary people and then distributed instantly across national borders, is here. The Web has been built, and has certainly drawn all Internet-using cultures into immediately contact with one another, but whether it has brought them *together* in the sense of peaceful pluralism and mutual respect and appreciation is questionable. It has, in many ways, erased national boundaries, but also crossed boundaries of what is found to be acceptable and, yes, legal in other countries.

1. The Yahoo! Case

¹⁹ *Egypt's Mohamed Morsi UN General Assembly Speech Transcript 2012*, Sep. 26, 2012, <http://www.latinospot.com/articles/4611/20120926/egypts-mohammed-morsi-un-general-assembly-speech-mubarak-united-nations-transcript.htm>.

²⁰ At U.N., Muslim World Questions Western Freedom of Speech, Chi. Trib., Sep. 28, 2012, http://articles.chicagotribune.com/2012-09-28/news/sns-rt-un-assemblyislam-pix-tvl5e8ksgta-20120928_1_muslim-leaders-weapon-against-hateful-speech-free-speech, Neil MacFARQUHAR, *At U.N., Egypt and Yemen Urge Curbs on Free Speech*, N.Y. Times, Sep. 26, 2012, http://www.nytimes.com/2012/09/27/world/united-nations-general-assembly.html?_r=0.

²¹ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (The Supreme Court invalidating New York blasphemy law).

²² Vice President Al Gore, *Speech for International Telecommunications Union*, Mar. 21, 1994, text available at http://cyber.eserver.org/al_gore.txt (last visited Dec. 4, 2012).

A good most recent illustration of the international problems that can arise from the lack of boundaries on the Internet is *Yahoo! v. Ligue Contre le Racisme et l'Antisémitisme*.²³

French criminal law prohibits display of Nazi uniforms, insignias and emblems. LICRA complained that Yahoo! were allowing their online auction service to be used for the sale of memorabilia from the Nazi period, and that auction was accessible to viewers and buyers in France. LICRA obtained a judgment against Yahoo! in the French Court. Yahoo! then sought a declaratory judgment in the US District Court that display of Nazi memorabilia was a protected speech under the First Amendment of the U.S. Constitution.²⁴ The District Court agreed. LICRA appealed to the Ninth Circuit which dismissed the case on ripeness grounds saying that Yahoo! could only assert its First Amendment rights if LICRA sought to enforce the French judgment in the U.S.²⁵ The Ninth Circuit did not discuss the issue of the First Amendment protection abroad. However, the decision implied that Yahoo might not be able to hide behind the First Amendment in France:

Judge William Fletcher noted:

*Yahoo! is necessarily arguing that it has a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others. [...] the extent — indeed the very existence — of such an extraterritorial right under the First Amendment is uncertain.*²⁶

The case could have served as a major testing-ground for free speech in the new frontiers of the cyberspace, and determined whether Internet postings that are lawful in the U.S. might still

²³ *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

²⁴ *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 169 F.Supp.2d 1181 (N.D.Cal. 2001).

²⁵ *Yahoo!*, 433 F.3d at 1216-1217.

²⁶ *Id.* at 1221.

have to comply with the laws of any country in the world where they can be accessed, but both the Ninth Circuit and the Supreme Court refused to provide any clarity on the issue²⁷.

2. Internet censorship.

The Internet was once viewed to have a life of its own, to be an entity beyond national borders. Today, however, it is clear and obvious that the virtual world *can* be controlled and pretty effectively. The reasons for censorship range from well-intentioned desires to protect children from harmful content to authoritarian attempts to control a people's access to information. Same laws that govern the real life apply to the Internet activity as well. One way or the other, national governments restrict, censor and block the World Wide Web.²⁸ There are number of ways for the government to control the Internet. Laws and regulations prohibit various types of content and violators are subject to criminal prosecution, fines etc. Internet Protocol (IP) addresses can be blocked, domain names can be blocked, various filtering technologies can be used to search for and block undesirable content. And if these efforts do not bring about the necessary result the government can cut off access to the Internet completely, as was recently seen in Syria.²⁹

In the United States the constitutional protections apply to online activities just as the do in the real world. The U.S. government was able to put certain restrictions to online speech to the extent of illegality of such speech and only so long as the restrictions are not overly broad.³⁰

²⁷ *Id.*, *cert. denied*, 547 U.S. 1163 (2006).

²⁸ Detailed country by country information on Internet censorship is provided by the OPENNET INITIATIVE, <http://opennet.net/>.

²⁹ Martin Chulov, *Syria Shuts off Internet Access Across the Country*, Guardian, Nov. 29, 2012, <http://www.guardian.co.uk/world/2012/nov/29/syria-blocks-internet>.

³⁰ See e.g. Digital Millennium Copyright Act, 17 U.S.C. § 1201 (criminalizes the discussion and dissemination of technology that could be used to circumvent copyright protection mechanisms); Children's Online Privacy Protection Act, 15 U.S.C. § 6501-6506 (restricts collecting personal information from children under 13 years of age); Children's Internet Protection Act, 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6) (requiring federal grant-receiving schools and libraries to install filtering software to prevent access to obscene and harmful material); see also *infra* note 129.

Therefore, the Internet can be censored more or less effectively when it comes to illegal activities, and laws can develop to address the issues of illegality in the virtual world. Nevertheless, the problem remains: the Internet is a cross-borders entity which unites people all over the world and at the same time exacerbates the clash between not only civilizations but countries within one civilization. What should be done when a lawful and protected speech of one country is a crime in the other? Basically, the question becomes to what extent the U.S. users are protected extraterritorially under the First Amendment.

3. The Innocence of Muslims.

The Innocence of Muslims video does not fall the censorship-deserving category in America. The video is a satire, mockery of particular religious beliefs. The religious speech is not simply legal but is afforded the greatest protection under the U.S. Constitution.³¹ What makes the situation problematic is that it is illegal in another country and, thanks to the Internet, it can be viewed over there just as easily as here. This situation creates a somewhat unsolvable problem on international level. The question becomes how can an open society protect free speech while also protecting its citizens from criminal prosecution in another country, or from violent reactions of others, especially in the time of “inflammable nature of the world conditions.”³²

The U.S. government has found itself in a challenging position, in both in the sense of being in a difficult position, and a defiant one. On the one hand, the U.S. is bound to protect the ideals of the Constitution, but on the other hand, post-9/11 world is dedicated to eradicate terrorism. No one wants to incite Islamic fundamentalists into committing terrorist acts again.

³¹ See *supra* note 21.

³² See *infra* note 61.

No one wants embassies burnt and innocent people murdered. This is a high price to pay for freedom of speech.

There are several ways under the current state of law that the government may take to address these problems in the future. These approaches, however, are plagued by constitutional restraints, by the nature of Internet, and by the nature of Islamic fundamentalism.

III. FIRST AMENDMENT JURISPRUDENCE.

The United States is the country dedicated to provide an extremely broad protection of freedom of speech. The first amendment to the US Constitution says:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.³³

However, the protection of speech is not absolute.³⁴ Over the course of the last 100 years or so the U.S. Supreme Courts has carved out a jagged path, sometimes protecting speech, sometimes restricting, as contingencies dictated. The result is a patch-work jurisprudence that is far from being consistent. Decisions are often dictated less by lofty ideals and more by conditions on the ground. It is axiomatic that at times of war, speech becomes the first casualty.

A contemporary analysis of constitutionality of the restrictions of speech fall into 2 broad categories: content-based restrictions and content-neutral.³⁵

Content-neutral restrictions limit communication without regard as to the message conveyed. For content-neutral restrictions the Court applies intermediate scrutiny test to see

³³ U.S. Const. amend. I.

³⁴ *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002), (“As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content; however, this principle, like other First Amendment principles, is not absolute.”).

³⁵ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (“Principal inquiry in determining whether restriction on free speech is “content-neutral” is whether government has adopted restriction because of its disagreement with the message that speech conveys; government's purpose is controlling consideration.”)

whether the restrictions are “substantially related to an important government objective.”³⁶ Under this analysis content neutral restrictions on speech that regulate time, place and manner of exercising of speech are usually permitted as long as they are narrowly tailored and leave the speaker with ample alternative channels of communication.³⁷

With content-based restrictions, on the other hand, there is a presumption of unconstitutionality and the burden is on the government to show why the law does not violate the constitution.³⁸

The theory of a “low-value speech” first appeared in *Chaplinsky v. New Hampshire*, where the Supreme Court observed that “certain well-defined and narrowly limited classes of speech...are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”³⁹ Such speech now includes obscenity⁴⁰, defamation⁴¹, speech integral to criminal conduct⁴², “fighting words”⁴³, child pornography⁴⁴, fraud⁴⁵, true threats.⁴⁶ The Supreme Court does not afford much of protection for these categories of speech and the government is normally able to pass laws prohibiting it.

Of considerably more interest with regard to the speech insulting Islam is content-based restrictions on high-value speech, such as political or religious speech. It is much harder to pose

³⁶ *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 535 (1980).

³⁷ *Ward*, 491 U.S. at 791.

³⁸ *U.S. v. Alvarez*, 132 S.Ct. 2537, 2543-2544 (2012) (“As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content, and as a result, the Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality,” citing *Aschcroft*, 542 U.S. at 660).

³⁹ *Chaplinsky v. New Hampshire*, 316 U.S. 568, 572 (1942).

⁴⁰ *Miller v. California*, 413 U.S. 15 (1973).

⁴¹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴² *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

⁴³ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁴⁴ *New York v. Ferber*, 458 U.S. 747 (1982).

⁴⁵ *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

⁴⁶ *Watts v. United States*, 394 U.S. 705 (1969).

restrictions in such cases; supposedly speech can be restricted only in very narrow circumstances: when it incites imminent lawless action,⁴⁷ or when it presents some grave and imminent threat the government has the power to prevent,⁴⁸ although a restriction under the latter category is most difficult for the government to sustain.⁴⁹ Thus, even political speech, which the Supreme Court has always recognized as the most highly valued kind of speech, may in certain cases be regulated if it is shown to incite or produce an imminent lawless action, or if a compelling state interest is demonstrated to support the regulation.

Thus, under the current First Amendment analysis the government has two ways to address the problem presented by the Innocence of Muslims video in the future: to argue that the speech in question is intended or is likely to incite or produce an imminent lawless action or to argue that restriction is justified in light of the threat to national security.

A. Imminent Lawless Action.

Schenck v. United States was the first important case involving free speech.⁵⁰ It arose out of the Socialist Party of America leaflets advocating opposition to the military draft during WWI. Charles Schenck, the Secretary of the party, was indicted for violation of Espionage Act, which prohibited interference with military recruitment. Schenck appealed his conviction all the way to the Supreme Court, asserting the violations of his First Amendment constitutional right of free speech. The Supreme Court upheld the conviction ruling that the Espionage Act did not violate the First Amendment. The court paid special attention to the circumstances surrounding

⁴⁷ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁴⁸ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

⁴⁹ *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁵⁰ *Schenck v. United States*, 249 U.S. 47 (1919).

the speech in question⁵¹ and analogized Schenck's act to "shouting "Fire!" in a crowded theatre and causing panic."⁵²

The Court noted that while in peacetime such advocacy could be harmless speech, in times of war it could be construed as national subordination. Therefore, the court gave deference to the Executive branch's efforts during the time of war and considered speech restrictions justified. A clear and present danger test was promulgated for the first time: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁵³

The "clear and present" danger in *Schenk* had little to do with violence. What the government wanted to prevent was an opposition to its military recruitment efforts. The threat was to its own political interest. Nonetheless, the Court allowed to suppress the speech.

The "clear and present danger" test was reformulated in 1951 in *Dennis v. United States*.⁵⁴ Eugene Dennis, a Secretary of the Communist Party USA, was convicted for violating the Smith Act, which prohibited advocating the overthrow and destruction of the United States government by force and violence.⁵⁵ Interestingly, the Communist party did not have a specific plan to overthrow the government, but the prosecutor argued the Party's philosophy generally advocated the violent overthrow of the government.⁵⁶ The Court affirmed the conviction. It applied a modification of the "clear and present danger" test suggested by Judge Learned Hand of the Second Circuit, which asks: "whether the gravity of the "evil," discounted by its

⁵¹ *Id.* at 52 ("the character of every act depends upon the circumstances in which it is done").

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Dennis v. United States*, 341 U.S. 494 (1951).

⁵⁵ 18 U.S.C.A. § 2385.

⁵⁶ See *Brief for the United States* at 69, 196, *Dennis*, 341 U.S. 494.

improbability, justifies such invasion of free speech as necessary to avoid the danger.”⁵⁷ The Court never questioned the power of the Congress to “prohibit acts intended to overthrow the Government by force or violence.”⁵⁸ The only question was whether the means employed were in conflict with the First Amendment.⁵⁹

What is relevant to the present discussion is the argument raised in *Dennis* that on its face the statute prohibits even an academic discussion of Marxism-Leninism. The court said the language of the statute is directed to advocacy, not mere discussion, and paid a special emphasis to the fact that even though there had never been an actual attempt of an overthrow, the existence of a highly organized conspiracy “coupled with the inflammable nature of world conditions, similar uprising in other countries, and the touch-and-go nature of our relationship with countries with whom petitioners were in the very least ideologically attuned.”⁶⁰ Thus, the conviction was justified.

“The evil” the government tried to prevent was arguably not violent overthrow but peaceful overthrow as well. By prohibiting advocacy of communism, the government in actuality prohibited teachings and discussions of the ideology, thus suppressing any non-violent attempts to bring Communism onto American land. The government was not concerned with violence, but with its own self-preservation.

In 1961, came *Brandenburg v. Ohio*, a case in which the Supreme Court established a new “imminent lawless action” test.⁶¹ In *Brandenburg*, a member of Ku Klux Klan was convicted under Ohio Criminal Syndicalism Statute. In a very short opinion the court stated that States are not permitted “to forbid or proscribe advocacy of the use of force or of law violation

⁵⁷ *Dennis*, 341 U.S. at 510.

⁵⁸ *Id.* at 501, 509.

⁵⁹ *Id.* at 501.

⁶⁰ *Id.* at 510-511.

⁶¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁶² This formulation casts doubts on the holding in *Dennis*. However, the court explicitly relied on *Dennis* when formulating this new test.⁶³ Thus, the implication is that *Dennis* was not overruled. Instead, the “clear and present danger” test of Holmes have been “distorted beyond recognition”⁶⁴ In a more elaborated concurrent opinion Justice Douglas distinguished the cases decided under the “clear and present danger” test on the basis that those decision came in the time of War.⁶⁵

It is worth noting that *Brandenburg* came not only at the time of peace but also involved an act of a State legislature rather than an act of Congress. The stakes were quite different: localized acts of violence based on racial discrimination as opposed to propaganda in war time that arguably could threaten the very existence of the U.S. government.

Following *Brandenburg* it would, therefore, appear that the government would not be allowed to restrict this kind of speech in times of peace. Nonetheless, things might change swiftly when the stakes are higher. *Dennis* and *Schenck* have not formally overruled. During the times of war against terrorism⁶⁶ the revival of the restrictive “clear and present danger” test does not seem too attenuated.

There is an inherent flaw, however, in any attempt to restrict the speech similar to the Innocence of Muslims video under this exception. The speech in question does not advocate neither terrorism nor violence. The speech is provocative but only to the extent of offending the

⁶² *Id.* at 447.

⁶³ *Id.*

⁶⁴ *Id.* at 453 (Douglas, J., concurring).

⁶⁵ *Id.* at 452 (“Though I doubt if the ‘clear and present danger’ test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace”).

⁶⁶ *See infra* Section IV, discussion of the war against terrorism in section.

listeners' sensibilities. Thus, any legislation addressing the problem would be overly broad.⁶⁷ Arguably, in this particular situation the intent of the author was to provoke.⁶⁸ A law that specifically addresses the intent to provoke may seem reasonable. However, The Satanic Verses did not have such a specific intent, nor did the Danish cartoons, which indicates that it is not so much the speech that causes the reaction but the "inflammable nature of the world conditions." Any attempt to restrict such speech that has a potential to offend Islamic sensibilities would likely violate other Supreme Court's precedents.⁶⁹

B. Grave and Imminent Threat.

As noted by the Supreme Court, this exception to the First Amendment protection is the most difficult for the government to sustain.⁷⁰ A clear demonstration of the difficulty in overcoming this hurdle is demonstrated in the case of WikiLeaks.⁷¹

WikiLeaks, a non-for-profit website that publishes secret information from anonymous sources.⁷² It became famous in the US in 2010 when it released the video "Collateral Murder," showing American soldiers in an Apache helicopter shooting at unarmed civilians, two Reuters journalists, and children. Following that, was the release of thousands of confidential messages about the wars in Iraq and Afghanistan and the conduct of American diplomacy around the world.⁷³ The reactions of the U.S. government officials varied.⁷⁴

⁶⁷ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997) (The Court invalidated the Communications Decency Act on the grounds that the statute was overly broad suppression of speech.)

⁶⁸ See *supra* note 9.

⁶⁹ See *Cox v. Louisiana*, 379 U.S. 536 (1965) (The Supreme Court held that hecklers may not be allowed to veto a speaker's right of free speech); see also *supra* note 21.

⁷⁰ See *supra* note 49.

⁷¹ See generally Times Topics, *WikiLeaks*, N.Y. Times, <http://topics.nytimes.com/top/reference/timestopics/organizations/w/wikileaks/index.html> (last updated Aug. 16, 2012).

⁷² See WIKILEAKS, *About, What is Wikileaks*, <http://wikileaks.org/About.html> (last visited Dec. 4, 2012).

⁷³ See *supra* note 71 ("WikiLeaks posted 391,832 secret documents on the Iraqi war and 77,000 classified Pentagon documents on the Afghan conflict. It also made available about 250,000 individual cables — the daily traffic between the State Department and more than 270 American diplomatic outposts around the world").

What is of particular interest is that neither the website nor its founder have ever been charged with any crime. The founder of WikiLeaks, Julian Assange, and the company has been formally designated as “enemies of the United States” by the U.S. Department of Defense.⁷⁵ However, the only arrest warrant issued was a European arrest warrant, and on charges unrelated to the WikiLeaks activity.⁷⁶ The US Attorney General, Eric H. Holder Jr., made a statement that the prosecutors were looking at possible charges against Assange and the WikiLeaks.⁷⁷ Interestingly, the statement was made in 2010. So far the only legal action by the government in connection with Wikileaks was the arrest of Bradley Manning, a US Army Soldier and a source for WikiLeaks, who was charged with such offences as communicating national defense information to an unauthorized source and aiding the enemy.⁷⁸

This is not to suggest that the government did not address the situation at all.⁷⁹ However, there are no *legal* means available for the Attorney General under the current law to arrest Julian

⁷⁴ See e.g. Yunji de Nies and Sunlen Miller, *Obama on WikiLeaks: ‘Documents Don’t Reveal Any Issues that Haven’t Already Informed our Public Debate’*, ABC News, Jul. 27, 2010, <http://abcnews.go.com/blogs/politics/2010/07/obama-on-wikileaks-documents-dont-reveal-any-issues-that-havent-already-informed-our-public-debate/>; Stephen Erlanger, *Euroepans Criticize Fierce U.S. Responses to Leaks*, N.Y. Times, Dec. 9, 2010 (“American officials and politicians have been widely condemned in the European news media for calling the leaks everything from “terrorism” (Representative Peter T. King, Republican of New York) to “an attack against the international community” (Secretary of State Hillary Rodham Clinton),” <http://www.nytimes.com/2010/12/10/world/europe/10wikileaks-react.html>.

⁷⁵ See *US Documents Reportedly Refer to Assange, WikiLeaks as ‘enemy’*, NBC World News, Sep. 26, 2012, http://worldnews.nbcnews.com/_news/2012/09/26/14115231-us-documents-reportedly-refer-to-assange-wikileaks-as-enemy?lite.

⁷⁶ Nick Davies, *10 days in Sweden: the full allegations against Julian Assange*, Guardian, Dec. 17, 2010, <http://www.guardian.co.uk/media/2010/dec/17/julian-assange-sweden>.

⁷⁷ Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution*, N.Y. TIMES (Dec. 7 2010), <http://www.nytimes.com/2010/12/08/world/08leak.html>.

⁷⁸ For the initial charges, see United States Division – Center, Media Release, *Soldier faces criminal charges*, Jul. 6, 2010, available at <http://graphics8.nytimes.com/packages/pdf/world/2010/Manning-press-release.pdf> (last visited Dec. 4, 2012); see also Charge Sheet, available at <http://graphics8.nytimes.com/packages/pdf/politics/20110302-manning.pdf> (last visited Dec. 4, 2012).

⁷⁹ See Glenn Greenwald, *Prosecution of Anonymous activists highlights war for Internet control*, Guardian, Nov. 23 2012 (“After public demands and private pressure from US Senate Homeland Security Chairman Joe Lieberman, Amazon then cut off all hosting services to WikiLeaks,” “Chairman Lieberman’s public pressure, by design, also led to the destruction of WikiLeaks’ ability to collect funds from supporters. Master Card and Visa both announced they would refuse to process payments to the group, as did America’s largest financial institution, Bank of America. Paypal not only did the same but froze all funds already in WikiLeaks’ accounts (almost two years later, a court in Iceland ruled that a Visa payment processor violated contract law by cutting of those services). On several occasions

Assange or to stop WikiLeaks from continuing. Neither the Espionage Act nor the Patriot Act are helpful. The charges that the government is reportedly contemplating are the theft of government property.⁸⁰ Thus, the government cannot criminally prosecute Assange and WikiLeaks, nor can it enjoin the website from further publications under the current state of law.

1. Prior restraint.

The government is hamstrung by the strict level of scrutiny afforded to the high-value speech. It cannot enjoin WikiLeaks because of the holding of the famous case *New York Times Co. v. United States*, or the Pentagon Papers, case, a landmark case dealing with government censorship.⁸¹

Secret government information regarding the US involvement in Vietnam fell into the hands of the New York Times and Washington Post reporters. The government tried to enjoin the newspapers from publishing that information asserting the violation of the Espionage Act arguing “grave and imminent danger to the security of the United States.”⁸² The Court issued a very brief *per curiam* opinion affirming the lower courts’ decisions that refused an injunction. The concurring opinions, however, were more elaborative. Justice Black argued for absolute superiority of the First Amendment and against any interference with freedom of expression.⁸³ Justices Douglas, Stewart and White argued that a free press is a necessary check on the government.⁸⁴ Justice Marshall pointed to the fact that the Espionage Act said nothing about prior restraint and it was not a job of the Court to create laws.⁸⁵

in both 2011 and 2012, WikiLeaks was prevented from remaining online by cyber-attacks”), <http://www.guardian.co.uk/commentisfree/2012/nov/23/anonymous-trial-wikileaks-internet-freedom>.

⁸⁰ See Adam Entous and Evan Perez, *Prosecutors Eye WikiLeaks Charges*, Wall St. J., Aug. 21, 2010, http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704488404575441673460880204.html

⁸¹ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁸² *Brief for the United States* at 7, *New York Times Co.*, 403 U.S. 713 (Nos. 1873, 1885).

⁸³ *New York Times Co.*, at 714-20 (Black J., concurring).

⁸⁴ *Id.* at 720-24 (Douglas J., concurring), 727-730 (Stewart, J., concurring).

⁸⁵ *Id.* at 741, 743.

The case does not suggest that prior restraints are impossible. It only suggests, in accord with its precedents, that the burden on the government is very high. To overcome this burden the government must show the significant interest, certain and irreparable harm, that the prior restraint is necessary and effective in preventing the harm, and no alternatives exist.⁸⁶ For example, *Near v. Minnesota* listed four scenarios under which prior restraints may be issued: “actual obstruction to [the Government's] recruiting service or the publication of the sailing dates of transports or the number and location of troops;” 2) “the primary requirements of decency . . . against obscene publications;” 3) “incitements to acts of violence and the overthrow by force of orderly government . . . words that may have all the effect of force;” and 4) “[protection of] private rights according to the principles governing the exercise of the jurisdiction of courts of equity.”⁸⁷ In *Kingsley Books v. Brown*, the Court authorized a prior restraint of already outlawed material (obscenity), but under very narrow circumstances: the statute in question gave a defendant an opportunity within two days to prove in court that the publication does not violate the obscenity law.⁸⁸

2. Removal order.

The only legal action against WikiLeaks was brought by a private party in *Bank Julius Baer & Co. Ltd v. Wikileaks*.⁸⁹ Bank Julius Baer filed a preliminary injunction motion seeking to disassociate the site's domain name records with its servers, preventing use of the domain name to reach the site after WikiLeaks published information regarding private offshore accounts and their holders. A district court judge issued a temporary restraining order that required Dynadot,

⁸⁶ See *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980) (Law that restricts speech must directly advance the state interest involved and may not be sustained if it provides only ineffective or remote support for that purpose).

⁸⁷ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

⁸⁸ *Kingsley Books v. Brown*, 354 U.S. 436 (1957).

⁸⁹ *Bank Julius Baer & Co. Ltd v. Wikileaks*, 535 F.Supp.2d 980, 984 (N.D.Cal. Feb. 29, 2008).

the domain registrar of wikileaks.org, to stop hosting WikiLeaks.org and WikiLeaks to stop “publishing, disseminating, or hyperlinking to any document.”⁹⁰ The requested preliminary injunction was, however, denied after intervention by various pro-First Amendment amici. After hearing the arguments of those amici the court held “it is clear that in all but the most exceptional circumstances, an injunction restricting speech pending final resolution of the constitutional concerns is impermissible.”⁹¹

Of a particular interest is the court’s emphasis of the efficacy of an injunction. The court had doubts that in that particular case where the information was published online and received public attention an injunction would serve any useful purpose.⁹²

Therefore, the possibility of passing a law allowing for a restraint or removal of the content exists. The burden on the government is very high, but given the “inflammable nature of the world conditions”⁹³ and the Court’s willingness to defer to Congress in times of crises, the burden is not insurmountable.

On the other hand, there are number of reasons why the law would be impractical and ineffective.

First, for the issuance of a prior restraint for videos such as Innocence of Muslims to be effective the government must know in advance whether it is about to be uploaded. In the light of the nature of the Internet, which provides for an opportunity for over three hundred million people under the U.S. jurisdiction to upload anything at any time, it is just technically impossible for the government to know in advance when such material will be disseminated.

⁹⁰ *Bank Julius Baer & Co. v. WikiLeaks*, 2008 WL 612072 (N.D. Cal. Feb.13, 2008).

⁹¹ *Bank Julius Baer & Co.*, 535 F. Supp.2d at 985.

⁹² *Id.* (“The private, stolen material was transmitted over the internet via mirror websites which are maintained in different countries all over the world. Further, the press generated by this Court’s action increased public attention to the fact that such information was readily accessible online...there is evidence in the record that “the cat is out of the bag” and the issuance of an injunction would therefore be ineffective to protect the professed privacy rights of the bank’s clients”).

⁹³ See *supra* note 60.

Second, with an order to remove the content, just as in *Bank Julius Baer* the government will have difficulties to show that the injunction can be effective. In the virtual world, as soon as “the cat is out of the bag” it is difficult to stop it.⁹⁴ For example, Innocence of Muslim video is available today not only on YouTube where it was initially uploaded, but on a number of other websites not necessarily under the US jurisdiction.⁹⁵

IV. WAR AGAINST TERRORISM.

A. Domestically.

There is an arguably justifiable tendency to restrict individual rights and cut back civil liberties during times of war. The examples in American history are numerous. President Lincoln suspended habeas corpus during the Civil War which allowed the Lincoln administration to detain people that they believed to be either dangerous, or potentially dangerous throughout the war.⁹⁶ During World War II Roosevelt and his administration seized and interned nearly 100,000 Japanese-Americans for the entirety of the war.⁹⁷ The Supreme Court in *Korematsu* decision held that the Executive Order 9066, which ordered Japanese Americans into internment camps regardless of citizenship did not violate the Constitution because the need to protect against espionage outweighed the individual rights of Americans of Japanese descent.⁹⁸

The global War on Terror conducted today is no exception. Seven days after the September 11th attacks the Authorization for Use of Military Force (AUMF) bill passed into law which allowed the President to

“...use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed,

⁹⁴ *Bank Julius Baer & Co.*, 535 F. Supp.2d at 985.

⁹⁵ See e.g. <http://www.bestgore.com/brain-fart/watch-innocence-of-muslims-controversial-anti-muhammad-film/>; it is also available at vk.com, a very popular social network in Russia.

⁹⁶ Proclamation No. 94 – Suspending the Writ of Habeas Corpus (Sep. 24, 1862), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=69783> (last visited Dec. 4, 2012).

⁹⁷ Exec. Order No. 9066, 7 FR 1407 (1942).

⁹⁸ *Korematsu v. United States*, 323 U.S. 214 (1944).

or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”⁹⁹

On October 26th, 2001 President George W. Bush signed into law the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, more commonly known as the Patriot Act.¹⁰⁰ The Act expanded the definition of terrorism to include what is referred to as domestic terrorism, authorized searches and surveillance of electronic communications such as phone calls, messages, emails without a court order, granted permission to for searches and seizures of confidential records of the suspected terrorists or those who have connections with to them, increased the ability to detain and deport immigrants suspected of connections with terrorism, authorized “sneak and peek” search warrants.¹⁰¹ Other restrictions on rights and liberties include famous torture cases of Guantanamo Bay and No Fly List.¹⁰²

The 2010 Supreme Court decision in *Holder v. Humanitarian Law Project*¹⁰³ indicates that the limitations on constitutional rights during the War on Terror are not over.

An American human rights group, the Humanitarian Law Project, challenged the law prohibiting “material support” to terror groups.¹⁰⁴ The term “material support or resources” “means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or

⁹⁹ Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

¹⁰⁰ Pub. L. No. 107-56, 115 Stat. 272, 377 (2001).

¹⁰¹ See generally CRS Report for Congress, *The USA PATRIOT Act: A Sketch*, Apr. 18, 2002, available at <http://www.fas.org/irp/crs/RS21203.pdf> (last visited Dec. 4, 2012).

¹⁰² See generally The Federal Bureau of Investigation, *Vision & Mission* at http://www.fbi.gov/about-us/nsb/tsc/tsc_mission (last visited Dec. 4, 2012).

¹⁰³ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010).

¹⁰⁴ 18 U.S.C.A. § 2339B(a).

assistance...”¹⁰⁵ The Law Project wanted to provide advice to two terrorist groups on how to peacefully resolve their disputes and work with the United Nations. Thus, the issue was whether the government could make it a crime to engage in speech advocating only lawful, peaceful activity, when done in coordination with or for a foreign organization labeled “terrorist.” The Court began with the broad proposition, which was not contested in the case, that “combating terrorism is an urgent objective of the highest order.”¹⁰⁶ It disagreed with the government that argued that the statute only applied to conduct and thus should be analyzed under a low-standard test of O’Brien.¹⁰⁷ The Court determined that the statute targeted speech as well, and concluded that “a more rigorous scrutiny” should be applied.¹⁰⁸ However, the standard the Court actually applied did not reach the levels of strict scrutiny. Where it had previously held that strict scrutiny placed a heavy burden on the government to demonstrate with concrete evidence that speech restrictions were necessary to further a compelling interest, here the Court said no evidence was necessary to support the government’s speculation that even peaceful assistance to a terror group can further terrorism, in part by lending them legitimacy and allowing them to pretend to be negotiating while plotting violence. The Court explained:

“Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups — legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds — all of which facilitate more terrorist attacks.”¹⁰⁹

The Court deferred to a legislative speculation that any contribution to a terrorist organization facilitates terrorist conduct, the speculation that was not based on any evidence.¹¹⁰

¹⁰⁵ § 2339A(b)(1).

¹⁰⁶ *Id.* at 2724.

¹⁰⁷ *Id.* at 2723 (The Government is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that *O’Brien* provides the correct standard of review”).

¹⁰⁸ *Id.* at 2724.

¹⁰⁹ *Id.* at 2725.

¹¹⁰ *Id.*

Justice Stephen Breyer, also speaking for Justices Ruth Bader Ginsburg and Sonia Sotomayor, wrote a powerful dissent opinion where he argued that government failed to demonstrate how prohibiting the teaching of the use of International Law to peacefully resolve disputes helps achieve the security interest.¹¹¹ Never before, he said, had the court criminalized a form of speech on these kinds of grounds, detesting the idea that peaceful assistance buys negotiating time for an opponent to achieve bad ends.¹¹²

The application of this decision to the previously fully protected speech are colossal.

“Many forms of assistance may...be a criminal act, including, for example, filing a brief against the government in a terror-group lawsuit. Academic researchers doing field work in conflict zones could be arrested for meeting with terror groups and discussing their research, as could journalists who write about the activities and motivations of these groups, or the journalists’ sources. The F.B.I. has questioned people it suspected as being sources for a New York Times article about terrorism, and threatened to arrest them for providing material support.”¹¹³

The Court definitely did not apply a “strict scrutiny” analysis. Was it an omission or an indication that when at issue is “an urgent objective of the highest order” such as combating terrorism, the court feels the decrease of scrutiny justified? We have come full circle since Schenck and Dennis in again restricting what could be considered harmless, perhaps even humanitarian speech with an entity that we believe to be beyond redemption.

The War on Terror is altering the judicial landscape as it did in the times past, and today it is happening globally.

B. Internationally.

The European Convention of Human Rights allows for speech restrictions “in the interests of national security, territorial integrity or public safety, [or] for the prevention of

¹¹¹ *Id.* at 2732 (Breyer J., dissenting).

¹¹² *Id.* at 2738.

¹¹³ Editorial, *A Bruise on the First Amendment*, N.Y. Times, June 21, 2010, http://www.nytimes.com/2010/06/22/opinion/22tue1.html?_r=0.

disorder or crime.”¹¹⁴ Therefore, as opposed to the U.S. Constitution, European law affirmatively allows certain restrictions on speech.

In 2005, the Council of Europe adopted a Convention on the Prevention of Terrorism, which requires states to criminalize "public provocation" of terrorism. The convention defines public provocation as the public dissemination of a message "with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed."¹¹⁵ The incitement standard does not apply, the message need not directly encourage terrorism, the risk of such conduct is enough. Innocence of Muslims video can easily fall under this definition.

In September 2005, the U.N. Security Council adopted a UK-sponsored resolution that purported to repudiate "attempts at the justification or glorification of terrorist acts that may incite further terrorist acts."¹¹⁶ Although the resolution used the term incitement, rather than indirect incitement, its references to justification and glorification suggested a broad understanding of the term. The possible broad interpretation is also evident from the UK's understanding of terrorism: the United Kingdom considers terrorism a movement with an ideology that has to be confronted not just by law enforcement and military campaigns but also in the battlefield of "ideas, hearts and minds."¹¹⁷

In 2008, the European Court of Human Rights had an opportunity to analyze the French criminal prohibition on glorification of terrorism in *Leroy v. France*.¹¹⁸ A French cartoonist Denis Leroy was convicted by a French Court in 2002 after the publication of a cartoon in the

¹¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Article 10.

¹¹⁵ Convention on the Prevention of Terrorism, Council of Europe, May 16, 2005, Article 5,

¹¹⁶ S.C. Res. 1624 (Sep.14, 2005).

¹¹⁷ Prime Minister Tony Blair, *Address to the Labor Party National Conference*, July 16, 2005, available at http://news.bbc.co.uk/2/hi/uk_news/4689363.stm.

¹¹⁸ *Leroy v. France*, App. No. 36109/03, Eur. Ct. H.R. (2008), available only in French at <http://www.echr.coe.int/ECHR/EN/hudoc>.

Basque paper. Leroy's satirical caricature linked 9/11 attack with America's decline and was published two days after the attacks. The cartoonist brought an application to the European Court of Human Rights, relying on Article 10 of the Convention guaranteeing freedom of expression.¹¹⁹

The Court recognized the cartoonist's freedom of expression rights, but noted the cartoon was not just a criticism of American imperialism. The court found that it supported and glorified the violent destruction of the U.S. thus expressing moral support for the terrorist attack. The publication also provoked a public reaction and was capable of causing violence. In light of these circumstances the Court found that the conviction was not disproportionate to the legitimate aim of the French government.

Therefore, the floodgate for speech regulation in the name of war against terrorism has been opened in Europe.

So far the resolution evidences the compromise between permission of speech restrictions in Europe and prohibitions in the U.S.¹²⁰ However, in light of the *Humanitarian Law Project* decision, the pendulum appears to be swinging toward greater censorship.

The European example is anathema to the traditional protections of speech in the U.S. However, in the name of the global fight against terrorism and Court's deference to the legislative and the executive branches in times of crises, chances are that further restrictions on the First Amendment may come into effect. The European and the U.N model might be

¹¹⁹ See Helsinki Foundation for Human Rights, *Leroy v. France* at http://www.hfhrpol.waw.pl/obserwatorium/english/index.php?option=com_content&view=article&id=334:leroy-v-france-application-no-3610903&catid=41:etpcz&Itemid=53.

¹²⁰ See Daphne Barak-Erez and David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 Harv. Nat. Sec. J. 1, 22-23 (2011) (Several elements of compromise are evident from the text of the Convention: the concept of glorification of terrorism is included only in preamble which has no "operative implications;" also, the reservation in the preamble that any restrictions shall be such as are provided by law; the resolution is based on Chapter Six of the U.N. Charter which does not have a binding effect, as opposed to Chapter Seven, which is normally used for threats to international peace and security).

considered by some as the only effective way to address the violence caused by the Innocence of Muslims. The prohibition is broad enough to encompass virtually any speech that may disturb the Muslim world. Based on *Leroy*, actual disturbance is not even necessary.

Thus, given the ineffectiveness of all other means available to the government and organized world efforts to combat terrorism, the probability of America taking this path in unison with the European Nations is high.

V. GEOGRAPHICAL FILTERING.

A possible solution the U.S. may try to adopt is a statute that makes US-based websites that contain information that can be illegal in another country block IP addresses of that country from accessing the content, a practice known euphemistically as geographical filtering. Benefits of such compromise are obvious: the local speakers' First Amendment rights are not violated because they remain to speak freely; at the same time listeners in other countries where the speech is illegal will not have access to it, thus the laws of those countries are not violated. If such a statute also provides for a prior restraint with procedural safeguards similar to the ones in *Kingsley Books v. Brown*, the solution is seemingly perfect. But only seemingly.

First, there is a major constitutional question regarding to what extent the First Amendment protections reach extraterritorially. Does the First Amendment protect speech targeted abroad? Some courts and commentators suggest that it does not.¹²¹ Professor Timothy Zick argues that the First Amendment has “narrowly territorial and provincial orientation.”¹²² He argues that the U.S. citizens are not afforded as nearly great First Amendment protections

¹²¹ Timothy Zick, *The First Amendment in Trans-Border Perspective: Towards a More Cosmopolitan Orientation*, 52 B.C. L. Rev. 940; *Desai v. Hersh*, 719 F. Supp. 670, 676 (N.D. Ill. 1989) (“[F]irst amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution”); Robert D. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 Wm. & Mary L. Rev. 863, 866 (1984-1985) (“[W]hen scientific or technological information is communicated solely to a foreign person, corporation, or government, the generally cited first amendment values have little or no application.”).

¹²² Timothy Zick, *Falsely Shouting Fire in a Global Theatre: Emerging Complexities of Transborder Expression*, 65 Vand. L. Rev. 125, 174.

when they speak abroad as opposed to within the U.S. border. Zick points out that U.S. citizens enjoy only limited cross-border expressive and religious liberties. They have, he notes, only a limited First Amendment right to receive and distribute foreign materials inside the U.S.; may be denied personal access to foreign speakers for any “facially legitimate and bona fide” reason; have a narrow First Amendment “freedom” under the Due Process Clause to travel abroad for the purposes of gathering information about foreign cultures; are understood by some courts to have no First Amendment right to send communications to audiences abroad consisting solely of aliens; have only a limited right to associate with aliens located abroad; and have no First Amendment right to access and distribute the U.S. propaganda materials disseminated by their government abroad.¹²³ Thus, he argues, “if the First Amendment speaks at all beyond U.S. borders, it does so with only the faintest voice.”¹²⁴

At the same time, the U.S. courts were fairly consistent in refusing to honor a foreign judgment when the laws under which the judgments were issued violate the U.S. Constitution.¹²⁵ Therefore, the issue of the extent of extraterritorial protections of the First Amendment remains unresolved and arguably cannot be resolved under the principles on which the current First Amendment jurisprudence is based.¹²⁶

Thus, there may be a next *Yahoo!* case and the First Amendment jurisprudence may be reconsidered by the legislature and the court to meet the modern realities in a way to forbid the Web-based companies to violate foreign laws. However, the technical issues, costs and potential

¹²³ See Timothy Zick, *The First Amendment in Trans-Border Perspective: Towards a More Cosmopolitan Orientation*, 52 B.C. L. Rev. 940, 942-943.

¹²⁴ *Id.* at 943.

¹²⁵ See *Banchan v. India Abroad Publ'ns Inc.*, 154 Misc.2d 228, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992); *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (1997); *Yahoo! Inc.*, 433 F.3d 1199.

¹²⁶ See Zick, *The First Amendment in Trans-Border Perspective* at 945 (“But traditional free speech justifications, particularly those concerned with domestic self-governance, were designed to apply to speech by citizens located within the United States who are communicating with other citizens inside the United States. Those justifications do not expressly contemplate a world in which speech and associations frequently transcend national borders.”)

chilling effect associated with such measure will present huge obstacles.

First, technology is advanced enough for the users to circumvent filtering and blocking measures. Filtering technology has been used by companies like Google and Yahoo to locate their users in order to display appropriate advertisements, to block illegally posted copyrighted material, to block Innocence of Muslims in some of the Islamic countries. However, using proxies has been a wide-spread method to circumvent any government censorship based on IP address location.¹²⁷ Users do not have an incentive to use proxies to avoid advertisements, but are more eager to do so when it comes to the desire for information.

Second, such measures would necessarily entail a chilling affect because of its prohibitive costs to regular users. For companies like Yahoo and Google, implementing the geographical filtering technologies is affordable and a part of their daily operating activity. On the other hand, when it comes to regular less sophisticated internet users as well as smaller websites such measures could shut down virtually (“virtually” in both senses) all democratic the speech. The Supreme Court has been reluctant to impose expensive technology requirements on general internet users. That consideration was part of the reason why the Communications Decency Act and Child Pornography Prevention Act never passed constitutional muster.¹²⁸

¹²⁷ See Kate Murpy, *How To Muddy Your tracks on the Internet*, N.Y. Times, May 2, 2012 (“Shielding your I.P. address is possible by connecting to what is called a virtual private network, or V.P.N., such as those offered by [WiTopia](#), [PrivateVPN](#) and [StrongVPN](#). These services, whose prices price from \$40 to \$90 a year, route your data stream to what is called a proxy server, where it is stripped of your I.P. address before it is sent on to its destination. This obscures your identity not only from Web sites but also from your Internet service provider.”) <http://www.nytimes.com/2012/05/03/technology/personaltech/how-to-muddy-your-tracks-on-the-internet.html>.

¹²⁸ See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (The Supreme Court invalidating provisions of the Communications Decency Act (CDA) designed to protect minors from harmful material on the Internet, partly because the technological safe harbors in the statute were ineffective and “not economically feasible for most noncommercial speakers.”); see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (The Supreme Court striking down provisions of the Child Pornography Prevention Act of 1996 as too overbroad); *Id.* at 1719 (Kennedy, J., concurring in the judgment) (“Because “it is easy and cheap to reach a worldwide audience on the Internet, but expensive if not impossible to reach a geographic subset,” Internet speakers should not be forced to adopt technology that keeps Internet speech that is legal in some places from reaching places where it is illegal”).

VI. CONCLUSION.

Globalization and the development of the World Wide Web on one hand united people across the globe, providing invaluable forum for cultural exchange. However, it introduced a whole host of hitherto unimaginable problems on national and international levels, problems that put countervailing pressures not only on individual citizens, but also on governments and legislative bodies. Diplomacy has certainly been put in a whole new context, especially in light of the tens of thousands of cables that have been made public, for free, by WikiLeaks.

The video Innocence of Muslims has only been blocked in Muslim countries by a unilateral decision of Google. The U.S. government has no meaningful legal ways to stop those who wish to provoke the world of Islam. The U.S. constitution does not allow for any government interference. That is why the video is still accessible to pretty much every Internet user around the globe and the WikiLeaks continue their activity.

In the name of the war against terrorism the government may try to use one of the exceptions to the protection of speech that has been used in the past.

However, the article shows that the ways carved out on national level are ineffective to solve problems in globalized world, ineffective to address global issues coming up as a result of online activities. The solution may lie in uniting with the European model and compromising the U.S. constitutional protections.

The United States appears to be at a crossroad where it might have to choose between the principles of the Constitution as we know it or bending to adjust to the new realities.